

REPORT OF THE DIVISION ENGINEER

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CASE NUMBER: 2017CW3045

IN THE MATTER OF THE APPLICATION
FOR WATER RIGHTS IN:

CASE NO.: 17CW3045

APPLICANT: TerraCarta Energy Resources, LLC; C/o Jefferson V. Houpt and Ryan M. Jarvis;
Beattie, Houpt & Jarvis LLP

APPLICATION FOR: Change of Water Right

STRUCTURES: South Fork Reservoir, South Fork Reservoir No. 1, South Fork Reservoir No. 2, Bar
D Reservoir

The Division Engineer's comments, concerns and recommendations to the Referee are as follows:

Applicant requests the Court grant a change of water right to move South Fork Reservoir to three alternate locations of storage referred to as South Fork Reservoir No. 1, South Fork Reservoir No. 2 and Bar D Reservoir. Additionally, the applicant proposes to fill South Fork Reservoir No. 1 at a rate of 400 cfs through the South Fork Reservoir No. 1 Pump and Pipeline and to fill Bar D Reservoir at a rate of 70 cfs through the Bar D Reservoir Pump and Pipeline. The Colorado Water Conservation Board, United States Bureau of Land Management, The Oil Shale Corporation, Exxon Mobile Corporation, Mountain Water LLC, Rio Blanco Water Conservancy District, Puckett Land Company, 4M Ranch LLC, and Thompson/Quinn Families have each filed a statement of opposition in this case.

The source of water for South Fork Reservoir is the South Fork of the White River. The source of water for the proposed South Fork Reservoir No. 1 is the White River through the South Fork Reservoir No. 1 Pump and Pipeline and natural inflow from Divide Creek, Wolf Creek, Middle Fork Wolf Creek, East Fork Wolf Creek and Coal Creek all tributaries to the White River. The source of water for the proposed South Fork Reservoir No. 2 is the White River itself, and for the proposed Bar D Reservoir it is the White River through the Bar D Reservoir Pump and Pipeline, though it will be located on Yellow Creek of the White River. Neither the White River itself nor the South Fork of the White River have been subject to an official call for administration and as such, the mainstem White River and South Fork of the White River are not considered over-appropriated. On the other hand, Yellow Creek has been subject to administration and is considered over-appropriated.

In Division 5 Civil Action 1269, South Fork Reservoir was awarded a conditional water storage right in the amount of 85,342.4 AF for industrial, domestic, municipal, recreational and irrigation purposes. Findings of reasonable diligence have been granted on a regular basis with the last one being in Case No. 10CW0029. In this last diligence case, the court cancelled the decreed municipal use and required that "the applicant seek to change the point of diversion and storage for the proposed South Fork Reservoir and South Fork Pipeline within the first six-year diligence period following the entry of this Decree. The requested change in point of diversion and storage will seek to move the South Fork Reservoir and South Fork Pipeline point of diversion and place of storage out of the Flat Tops Wilderness. If such change is not applied for within the first six-year diligence period, the South Fork Reservoir and South Fork Pipeline will be abandoned by Applicant." It appears the subject case is not requesting a change for the South Fork Pipeline.



The requested change herein to move the water rights certainly does move them out of the Flat Tops Wilderness and in actuality two of the structures (South Fork Reservoir No. 1 and South Fork Reservoir No. 2) are located over 100 miles downstream from the originally decreed point of diversion and with over 100 intervening structures. The proposed location for Bar D Reservoir is at a point on Yellow Creek located approximately 23 miles upstream from its confluence with the White River, with again many intervening water rights. The confluence of Yellow Creek and the White River is approximately 81 miles downstream of the originally decreed point of diversion for South Fork Reservoir.

As mentioned in the application, the locations for South Fork Reservoir No. 1, South Fork Pump and Pipeline, and South Fork Reservoir No. 2 coincide with the locations of the Wolf Creek Off-Channel Reservoir, Wolf Creek Reservoir Pump and Pipeline and Wolf Creek Mainstem Reservoir sites for which the Rio Blanco Water Conservancy District has been pursuing a water right for nearly four years. The Rio Blanco Water Conservancy District water court case is currently pending in Case No. 14CW3043. It is completely unclear what the applicant herein is trying to accomplish by moving their water rights down to proposed sites for which another entity is trying to obtain water rights. Is the applicant proposing to have a reservoir site capable of storing 175,342.4 AF (90,000 AF as claimed in 14CW3043 plus 85,342.4 AF for South Fork Reservoir)? Is the applicant suggesting that the reservoir site only have the more senior 85,342.4 AF water right decreed to it and that the Rio Blanco Water Conservancy District forego their junior 90,000 AF claim? As to Bar D Reservoir, it should be noted that the proposed location for it, if constructed, would inundated the proposed site of at least one of Mountain Water LLC's reservoirs.

CONCERNS

The following concerns must be addressed before I can recommend approval of this application:

1. The storage of water under the subject water right at the new point of diversion must be limited to that amount physically and legally available and within the decreed amount at the original points of diversion.
2. The applicant must provide evidence showing that South Fork Reservoir at its original location was intended to and could physically fill at a rate of 400 cfs and 70 cfs (the fill rate claimed for the South Fork Pump and Pipeline and Bar D Reservoir Pump and Pipeline, respectively).
3. Applicant must assess the contemplated draft of the subject water right and assure that the requested change will not result in an expansion of use.
4. Applicant has not requested a change in place of use for South Fork Reservoir. Applicant must provide evidence showing that the originally intended place of use will not change as a result of this request. Additionally, the applicant must explain how they intend to apply or get water to the original place of use from the new location(s), and provide evidence showing that they can and will accomplish this.
5. Any water right located between the originally decreed point of diversion on the South Fork of the White River and the proposed locations (include the intervening tributaries), would have never been subject to a call by or administration including the subject water right. Likewise, for the Bar D Reservoir, no part of the Yellow Creek drainage would have ever been subject to an administrative call for such right or for such right to have been allowed to operate in priority. As such, in the event of a call, this office will only curtail those rights that would be subject to administration at the original location and water will not be



allowed to be stored in priority to the detriment of intervening water rights. All this said, adequate language must be included in the decree that adequately protects all intervening water rights from injury, or as another option, the subject water right could be considered a 2017 water right when diverted at any of the new locations.

6. As questioned above, the applicant should explain what they are attempting to do by moving the South Fork Reservoir water right down to the sites of Wolf Creek Off-Channel Reservoir and Wolf Creek Mainstem Reservoir.
7. All conditional appropriations are subject to the anti-speculation doctrine. The anti-speculation doctrine to which an applicant must adhere when applying for a conditional water right continue to apply to diligence applications as well as change of water right applications. The purpose of the anti-speculation doctrine is to prevent the hoarding of water rights. The anti-speculation doctrine prevents entities from accumulating numerous, unnecessary conditional water rights in a manner detrimental to other water users. This said, the applicant must demonstrate that a diversion and ultimate beneficial use of water can be made at the location or locations identified in the subject case and that the requested change is not speculative.
8. The applicant should provide evidence showing that they can and will complete the appropriation at the new point(s) of diversion.
9. Adequate terms and conditions must be included in the final decree assuring there will be no injury to any other water rights as a result of the requested change.

RECOMMENDATIONS

Based on the above concerns, the State and Division Engineers ask that the issues outlined in this report be addressed prior to the court granting a change of water right to South Fork Reservoir to move the water right to the three described alternate locations.

It is the responsibility of the applicant(s) to pursue this case. To expedite the process, the applicant(s) should respond to the concerns above in a point-by-point manner in writing and the requested information submitted to the Water Court in a timely fashion.

07/13/2018

DATE



DIVISION ENGINEER



CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July 2018 a true and correct copy of this REPORT OF THE DIVISION ENGINEER was served through Colorado Courts E-Filing to the below persons:

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